COMMISSIONER OF TAXATION

v.

PRESTIGE MOTORS PTY. LIMITED

HIGH COURT, AUSTRALIA
MASON CJ, BRENNAN, DEANE, GAUDRON & McHUGH JJ.
[F.C. 94/034]
7 SEPTEMBER 1994

REVENUE LAW: Trustee lodging returns of income derived from trust estate - Revenue computing tax payable - Revenue sending Notice of Assessment addressed to trust estate - Whether assessment process complete - Whether Notice of Assessment should be addressed to the trustee - Whether trustee entitled to declaration that income tax shown on the face on the Notice not due and payable.

At all material times the respondent was the trustee of a trust estate known as the "Toyota Prestige Trust". In that capacity, it caused to be lodged with the Commissioner returns of income tax derived by it as trustee and the deductions claimed by it. Officers of the Australian Tax Office made calculations resulting in the computation of the tax payable. The Revenue sent out notices headed "Notice of Assessment" which were addressed to the trust estate at its address for service.

In the trial Court, the learned Judge concluded that the Commissioner, by serving in writing by post upon the person liable to pay tax the notices of assessments he had made, had completed the assessment process. His Honour further concluded that the returns had named the trust estate in respect of the net income for which the returns had been lodged and that the use of that name served to confirm that the trustee was assessed by reason of its office as trustee of that particular trust.

The Full Court of the Federal Court took the contrary view and held that as the Notices of Assessment did not contain the name of the person assessed, the process of assessment was incomplete and the respondent was entitled to the declaration that the notices were not "Notices of Assessment" for the purposes of the Income Tax Assessment Act 1936 (the Act) and therefore the income tax shown on the face of the notices is not due and payable.

The Revenue appealed further and argued that as there was no prescribed form of a notice of assessment, the only requirements of a valid notice are:

(1) that the amount of the taxable income, or net income in the case of a trustee, be specified in the notice;

(2) that the amount of the tax payable be specified also; and

(3) that the notice be served on the person assessed to tax.

The respondent, on the other hand, contended that the notice must state the name of the taxpayer as part of "the particulars of the assessment" within the meaning of s. 177(1) of the Act.

Held:

[1] The weakness of the respondent's argument and, conversely, the strength of the Commissioner's argument, is that the Act requires, not that the name of the taxpayer be stated in the notice, but that the notice be served "upon the person liable to pay the tax" (s. 174(1)). Section 177(1) of the Act, relied on by the Federal Court, does not require

that the notice state the name of the taxpayer and in any event the said section is only a facultative provision, the only consequence of the notice not falling within the sub-section being that the Commissioner cannot rely upon the provision. This leads to the conclusion that it is not essential to the validity of a notice of assessment that it state the name of the taxpayer liable to pay the tax.

[2] The principal purpose of the notice of assessment is to bring to the attention of the person on whom it is served that such person is liable to pay on the due date the amount of tax assessed in the notice on the income stated in the notice. Service of the notice on a taxpayer goes some way towards achieving this purpose but whether or not that purpose is achieved in a given case must depend upon the form and contents of the particular notice of assessment.

[3] The recipient of the notice in the present case would have understood it as a notice of assessment directed to the trustee of the Prestige Toyota Trust, and that the notice relates to the assessment of the trustee to tax in respect of a share of the net income of that trust. A notice addressed to a nominated trust purporting to state the tax payable is *prima facie* to be understood as a notice of tax to be met out of the trust estate, not a notice of tax assessed to a beneficiary in the estate. Such a notice is therefore to be understood as directed to the trustee in whom the assets of the trust are vested and who is authorised and required to retain the money needed to pay the tax assessed out of any money which comes to him in his representative capacity.

[4] There are several indications, apart from the naming of the trust and the address stated in the notice, that the notice of assessment relates to the tax liability of the trustee. The notice followed a return of income lodged by the respondent as trustee of the trust. The tax file number on the notice corresponded with that in the return, so that the return and the assessment made thereon were thus kept "separate and distinct from any other", as directed by s. 254(1)(b) of the Act. And what was expressed as the amount of taxable income was specified as "Your taxable income".

[5] Whatever the basis of the Commissioner's assessment may have been, the notice purported to define the tax liability of the trustee to be met out of money in the trust estate and in the circumstances the notice of assessment was a notice of assessment of the respondent to tax.

[Appeal allowed. Order of Federal Court set aside. In accordance with conditions imposed in granting special leave, order for costs made in Federal Court not disturbed and appellant to pay respondent's costs of the appeal to this Court].

Cases referred to:

Federal Commisioner of Taxation v. Belford [1952] 88 CLR 589 ***(refd)***
Tindal v. Federal Commissioner of Taxation [1946] 72 CLR 608 at 619 ***(refd)***
Union-Fidelity Trustee Co. of Australia Ltd. v. Federal Commissioner of Taxation [1969] 119 CLR 177 ***(refd)***
Fermanis v. Cheshire Holdings Pty. Ltd. [1990] 90 ATC 4, 201 ***(refd)***
Deputy Federal Commissioner of Taxation v. Brown [1958] 100 CLR 32 at 4211 ***(refd)***
Batagol v. Federal Commissioner of Taxation [1963] 109 CLR 243 ***(refd)***
Federal Commissioner of Taxation v. Bayly [1952] 86 CLR 506 at 509 ***(refd)***

Legislation referred to:

Income Tax Regulations, r. 38
Income Tax Assessment Act 1936, ss. 96, 97, 98 , 99(A), 166, 169, 174(1), 175, 177, 254(1)(b)(d)(e)

For the appellant - Australian Government Solicitor
For the respondent - C.R. Fieldhouse

JUDGMENT

Manson CJ, Brennan, Deane, Gaudron & McHugh JJ:

This appeal by the Commissioner against a decision of the Federal Court (Hill J., with whom von Doussa and Beazley JJ. agreed) allowing an appeal by the respondent from a decision of Gummow J. raises an important question concerning the validity of a notice of assessment of income tax directed to a trustee.

Facts

The Commissioner commenced an action in this Court, which was remitted to the Federal Court, seeking a declaration that certain notices were notices of assessment served by the Commissioner upon the respondent and a further declaration that income tax as so assessed was due and payable by the respondent to the Commissioner on the thirtieth day after service of these notices. The circumstances giving rise to the proceedings, which were admitted in pleadings and agreed by the parties, may be stated briefly. The summary which follows is taken from the judgment of Hill J.

At all material times, the respondent was the trustee of a trust estate known as the "Prestige Toyota Trust". In that capacity, it caused to be lodged with the Commissioner returns of income derived by it as trustee and the deductions claimed by it. Officers of the Australian Taxation Office made calculations resulting in the computation of tax payable in respect of the years of income ended 30 June 1979 to 30 June 1990 inclusive. On or about 19 June 1991 notices headed "Notice of Assessment" which incorporated these calculations were sent out, being addressed to:

> Prestige Toyota Trust
> C/- Price Waterhouse
> 13th Floor
> 200 St Georges Terrace
> Perth WA 6000

that being the address for service within the meaning of r. 38 of the Income Tax Regulations and the address for service of notices shown in the returns which had been lodged. Most of the notices were dated 19 June 1991. Each notice bore a file number "78 805 021", which was the file number stated in the returns. That file number was not the appropriate file number for the respondent's returns of income derived otherwise than as trustee.

Each notice specified an amount for "taxable income", an amount for the tax assessed on that taxable income and an amount said to be the balance of the assessment. Other amounts not relevant to the question in hand appear in the notices along with a total amount payable. Some notices specified a figure for "additional tax for incorrect return" and in the final year a figure for provisional tax was included.

Decisions of Courts below

Gummow J. concluded that the Commissioner, by serving in writing by post upon the person liable to pay tax the notices of assessments he had made, had completed the assessment process. His Honour further concluded that the returns had named Prestige Toyota Trust as the trust estate in respect of the net income for which the returns had been lodged and that the use of that name served to confirm that the trustee was assessed by reason of its office as trustee of that particular trust.

The contrary view taken by the Full Court of the Federal Court was expressed by Hill J. in the following passage:

> In my view, it would be sufficient to the validity of a notice of assessment made under s. 99A if the notice set out the share of net income upon which the Commissioner assessed the trustee liable to tax and the tax payable by the trustee. Those are the relevant particulars of the assessment which, together with the name of the trustee, should appear upon the notice.
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> As the present notices were not appropriate "Notices of Assessment" because they did not contain the name of the person assessed, the process of assessment is presently incomplete and the [respondent] is entitled to succeed. The [respondent] is entitled to a declaration that for the purposes of the Act the notices are not "Notices of Assessment" served by the Commissioner upon the [respondent]. In consequence, the income tax shown on the face of the notices is not due and payable by the [respondent].

Statutory provisions

Division 6 of Pt III of the Income Tax Assessment Act 1936 (Cth) ("the Act") deals with the taxation of trust income. Central to Division 6 is s. 95(1). That sub-section defines the expression "net income" as meaning:

> in relation to a trust estate ... the total assessable income of the trust estate calculated under this Act as if the trustee were a taxpayer in respect of that income and were a resident, less all allowable deductions.

The definition goes on to except certain deductions which are not relevant to the present appeal.

Under Division 6 of Pt III of the Act, liability to pay tax upon the net income of a trust estate may fall ultimately (see s. 100) either upon the trustee or upon the beneficiary. Whether a liability to pay tax falls immediately upon the trustee or upon a beneficiary depends upon the operation of the several provisions of that Division which follow s. 96. That section provides that there is no liability on a trustee to pay income tax upon the income of the trust estate except as elsewhere provided in the Act. Unless the Act expressly provides (*Federal Commisioner of Taxation v. Belford* [1952] 88 CLR 589 at 597), as it does in ss. 98, 99 and 99A, that the trustee "is liable to pay tax", income tax is either payable by the beneficiary or none is payable (*Tindal v. Federal Commissioner of Taxation* [1946] 72 CLR 608 at 619 per Latham CJ dissenting). Sections 97, 98 and 99 deal with three cases: (1) where a beneficiary is presently entitled to a share of the income, as distinct from a share of the net income, of the trust estate, and is not under any legal disability (s. 97); (2) where a beneficiary is so entitled but is under a legal disability (s. 98); and (3) where no beneficiary is so entitled to any part of that income or there is a part of it to which no beneficiary is presently entitled (s. 99). The operation of the three sections does not define the tax liability of beneficiaries in respect of distributions of income of a trust estate because income which beneficiaries receive from a trust estate is taxable in their hands under the general provisions of s. 25 (See *Union-Fidelity Trustee Co. of Australia Ltd. v. Federal Commissioner of Taxation* [1969] 119 CLR 177 at 187-188 where Kitto J. discusses the general framework of the provisions on Division 6 relating to liability to pay tax and states the effect of ss. 97, 98 and 99 as set out above).

In general, if a beneficiary is not under a legal disability and is presently entitled to a share of the trust income, the trustee is under no liability to pay tax in respect of that share of the income of the trust estate and the beneficiary is liable for that tax (s. 97).

Where, however, the beneficiary is under a legal disability and is presently entitled to a share of the income of the trust estate, the trustee is liable to pay the tax on that share of the net income of the trust estate as if it were the income of an individual not subject to any deductions (s. 98). Where no beneficiary is presently entitled to part of the trust income, the trustee is to be assessed and is liable to pay tax in respect of a proportionate share of the net income corresponding to the share of trust income to which no beneficiary is presently entitled (ss. 99, 99A). Where s. 98, s. 99 or s. 99A applies, the Commissioner is required to assess the trustee to tax in respect of the whole or part of the net income of trust estate of the year of income. In the present case, it was asserted in the Federal Court that the Commissioner was required to assess the trustee to tax by reason of s. 99A and the deeming provisions of s. 100A.

By virtue of s. 254(1)(b), the trustee was obliged to make a return in respect of any income derived by him in a representative capacity. Although s. 254(1)(b) provides that the trustee is to be assessed on the return, the trustee is not liable to pay tax on any of that income save in respect of so much of the net income of the trust as is brought to tax by s. 98, s. 99 or s. 99A. Where the trustee is liable to pay tax which is or will become due, the trustee is authorized and required to retain sufficient funds to meet that payment out of "any money which comes to him in his representative capacity"(s. 254(1) (d)) and, to that extent but only to that extent, the trustee is personally liable for that tax (s. 254(1) (e)). The trustee is not liable to be assessed to tax or to pay tax in respect of any share of the net income of a trust estate which is included in the assessable income of a beneficiary under s. 97 (*Fermanis v. Cheshire Holdings Pty. Ltd.* [1990] 90 ATC 4, 201). But, where the trustee is liable to be assessed to tax, the assessment imposes a debt to be borne by the estate (*Deputy Federal Commissioner of Taxation v. Brown* [1958] 100 CLR 32 at 4211). Section 254(1)(b) directs that "each return and assessment shall, except as otherwise provided by this Act, be separate and distinct from any other".

Division 6 of Pt III contains no specific provision dealing with the process of assessment. It is therefore necessary to look to the general provisions of the Act as they govern that process.

The expression "assessment" is defined by s.6(1) to mean:

> (a) the ascertainment of:
>
> ...
>
> (iv) in the case of any other taxpayer that is the trustee of a trust estate ... so much of the net income of the trust estate as is net income in respect of which the trustee is liable to pay tax;
>
> and of the tax payable on that taxable income or net income.

The expression "taxpayer" is defined by s. 6(1) to mean "a person deriving income".

From a taxpayer's return, and from any other information in his possession, or from any one or more of these sources, the Commissioner shall make an assessment of the amount of the taxable income of the taxpayer, and of the tax payable thereon (s. 166). Where under the Act any person is liable to pay tax, the Commissioner may make an assessment of the amount of such tax (s. 169).

Section 174(1) provides:

> As soon as conveniently may be after any assessment is made, the Commissioner shall serve notice thereof in writing by post or otherwise upon the person liable to pay the tax.

The validity of an assessment is not affected by reason that any of the provisions of the Act have not been complied with (s. 175).

Section 177(1) provides, at all material times:

> The production of a notice of assessment, or of a document under the hand of the Commissioner, a Second Commissioner, or a Deputy Commissioner, purporting to be a copy of a notice of assessment, shall be conclusive evidence of the due making of the assessment and, except in proceedings under Part V on a review or appeal relating to the assessment, that the amount and all the particulars of the assessment are correct.

Section 204 provides that, subject to the provisions of Pt VI, any income tax assessed shall be due and payable by the person liable to pay tax on the date specified in the notice as the date upon which the tax is due and payable, not being less than thirty days after the service of the notice or, if no date is specified, on the thirtieth day after the service of the notice.

Service of the notice of assessment brings to an end the process of assessment

As Kitto J. explained in *Batagol v. Federal Commissioner of Taxation* [1963] 109 CLR 243, service of the notice of assessment on the taxpayer fixes the ascertainment of the amount of the taxable income and the amount of the tax payable by the taxpayer and brings to an end the process of assessment. His Honour said (at 251-252):

> [I]f the Commissioner, having gone through the process of calculation, serves on the taxpayer a notice that he has assessed the taxable income and the tax at specified amounts, the tax becomes by force of the Act due and payable on the date specified in the notice or (if no date is specified) on the thirtieth day after the service of the notice: s. 204. Thus, and thus only, there is brought about an 'ascertainment' of the taxable income and of the tax ... The word 'ascertainment' being understood in this sense, the definition of 'assessment' means, in my opinion, the completion of the process by which the provisions of the Act relating to liability to tax are given concrete application in a particular case with the consequence that a specified amount of money will become due and payable as the proper tax in that case.

Service of the notice on the taxpayer brings the process of assessment to an end in the sense that, in conformity with s. 174(1), the notice, which necessarily reflects the requisite elements of the calculation that has been made, is served after the making of that assessment.

In *Batagol*, Kitto J. was directing his comments to an assessment of a taxpayer to tax on his own taxable income. In applying the provisions of the Act to an assessment of a trustee to tax in respect of the net income of the trust estate, it is necessary to take into account the definition of "assessment" in s. 6(1) as it relates to an assessment of a trustee to tax in respect of such income. Hence the process of assessment in such a case - and the notice - must specify, not the taxable income, but "so much of the net income of the trust estate as is net income in respect of which the trustee is liable to pay tax".

The requisite contents of the notice of assessment

The Commissioner contends that, there being no prescribed form of a notice of assessment, the only requirements of a valid notice are:

(1) that the amount of the taxable income, or net income in the case of a trustee, be specified in the notice;

(2) that the amount of the tax payable be specified also; and

(3) that the notice be served on the person assessed to tax.

The respondent, on the other hand, contends that the notice must state the name of the taxpayer as part of "the particulars of the assessment" within the meaning of s. 177(1).

The weakness of the respondent's argument and, conversely, the strength of the Commissioner's argument, is that the provisions of the Act require, not that the name of the taxpayer be stated in the notice, but that the notice be served "upon the person liable to pay the tax" (s. 174(1)). The Full Court did not regard this as a decisive consideration. That was because Hill J. concluded that s. 177(1) would fail in its purpose unless the reference to "all the particulars of the assessment" in the sub-section included the name of the taxpayer. The purpose which his Honour attributed to the sub-section was to avoid the need in recovery proceedings for the Commissioner to prove that the taxpayer had a particular taxable income or net income in the case of a taxpayer trustee, or to debar the taxpayer from contesting that the amount of the taxable or net income as shown in the notice was the taxpayer's income or that tax was payable thereon. However, s. 177(1) does not require that the notice state the name of the taxpayer. Furthermore, s. 177(1) is a facultative provision; if the notice does not fall within the sub-section, the only consequence is that the Commissioner cannot rely upon the provision.

This leads us to the conclusion that it is not essential to the validity of a notice of assessment that it state the name of the taxpayer liable to pay the tax. But we do not consider that this conclusion is a complete answer to the question which has arisen. That is because, on the view which we take of the provisions, it is necessary that the notice should bring to the attention of the person on whom it is served that the assessment to which it relates is an assessment of that person to tax. The principal purpose of the notice of assessment is to bring to the attention of the person on whom it is served that such person is liable to pay on the due date the amount of tax assessed in the notice on the income stated in the notice (See *Federal Commissioner of Taxation v. Bayly* [1952] 86 CLR 506 at 509 per Williams J.). No doubt service of the notice on a taxpayer goes some way towards achieving this purpose. But whether the purpose is achieved in a given case must depend upon the form and contents of the particular notice of assessment. Thus, to take an example given by Hill J. in the Federal Court, a notice assessing A to tax but served on B instead could not stand as a notice assessing B to tax.

Validity of the notice in the present case

Subject to a problem which we shall identify shortly, we consider that the recipient of the notice in the present case would have understood it as a notice of assessment directed to the trustee of the Prestige Toyota Trust, and that the notice relates to the assessment of the trustee to tax in respect of a share of the net income of that trust. A notice addressed to a nominated trust purporting to state the tax payable is *prima facie* to be understood as a notice of tax to be met out of the trust estate, not a notice of tax assessed to a beneficiary in the estate. Such a notice is therefore to be understood as directed to the trustee in whom the assets of the trust are vested and who is authorized and required to retain the money needed to pay the tax assessed out of any money which comes to him in his representative capacity.

There are several indications, apart from the naming of the trust and the address stated in the notice, that the notice of assessment relates to the tax liability of the trustee. The

notice followed a return of income lodged by the respondent as trustee of the trust. The tax file number on the notice corresponded with that in the return, so that the return and the assessment made thereon were thus kept "separate and distinct from any other", as s. 254(1)(b) directed. And what was expressed as the amount of taxable income was specified as "Your taxable income."

The problem to which we referred earlier arises from a lack of correspondence between statements in the return of income relating to the income of the trust estate and the amount of the income as stated in the notice on which tax was assessed. In Schedule A of the return there appears under the heading "Statement of Net Income for Income Tax Purposes":

Schedule		
2.	Net profit as per statement of profit and loss	$4,630,328
	Less	
7.	Investment allowance	(1,498)
	Net income distributed to beneficiaries	$4,628,830

Then, in Schedule A/1 to the return, there appears under the heading "Statement of Distribution of Net Income" the following:

Name	No and class	Net income distributed
LS Perron	50 "A"	116
Ronald Lyon Australia (Vic) Pty Ltd	1,866,850 "B"	4,320,126
GJ Gadsdon	26,670 "B"	61,718
BP Black	26,670 "B"	61,718
JE Potts	20,002 "B"	46,287
DE Potts	20,002 "B"	46,289
Brencolda Nominees Pty Ltd	40,005 "B"	92,576
	2,000,250	$4,628,830

The amount thus stated to have been distributed to Ronald Lyon Australia (Vic) Pty. Ltd. corresponds precisely with the amount set against "Your taxable income is" in the notice of assessment served on the respondent. It is not suggested that this means that the notice is to be understood as a notice which assesses Ronald Lyon Australia (Vic) Pty. Ltd. to tax. Nor could the notice be so understood. A notice of assessment of a beneficiary to tax (other than a default assessment) would be made on the beneficiary's return of income and would not be identified by the tax file number of the trustee. The inference to be drawn from the notice which states what "Your taxable income is" in the context of the trustee's return bearing the same tax file number is that the Commissioner has rejected the basis on which the return was prepared, namely, that the sum of RM4,320,126 was distributed to a corporate beneficiary who was presently entitled to that share of the income of the trust estate.

As we noted earlier, the Commissioner asserted in the Federal Court that he was required to assess the trustee to tax by reason of the provisions of ss. 99A and 100A. Whether the basis on which the Commissioner made the assessment was disclosed in any adjustment sheet accompanying the notice is a question which was not fully explored in the Courts below. But, whatever the basis of the Commissioner's assessment may have been, the notice purported to define the tax liability of the trustee to be met out of money in the trust estate.

Conclusion

For the foregoing reasons, the notice of assessment was, in our view, a notice of assessment of the respondent to tax.

The appeal should be allowed. The orders of the Full Court of the Federal Court should be set aside. In lieu thereof, the appeal to that Court should be dismissed. In accordance with the conditions imposed by this Court in granting special leave, the order for costs made in the Full Court should not be disturbed and the appellant should pay the respondent's costs of the appeal to this Court.